

(1953) 12 BOM CK 0012

In the Bombay High Court

Case No : O.C.J. Miscellaneous Petition No. 402 of 1953

Alembic Chemical Works Co. Ltd.

APPELLANT

Vs

P.D. Vyas

RESPONDENT

Date of Decision : 09-12-1953

Acts Referred:

Industrial Disputes Act, 1947 — Section 30, 36
Transfer of Property Act, 1882 — Section 53

Citation : (1954) 56 BOMLR 917

Hon'ble Judges : Tendolkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Tendolkar, J.—This is a petition filed by the Alembic Chemical Works Company, Ltd., and one of its directors, Mr. P. C. Hathi, against Mr. P. D. Vyas, constituting the Industrial Tribunal under the Industrial Disputes Act, and the Baroda Chemical Works Kamdar Mandal for an appropriate writ, direction or order for setting aside an order passed by the Industrial Tribunal on October 9, 1953, preventing Mr. Hathi from appearing in the proceedings before the Tribunal.

2. It is not necessary to state at any length the facts that gave rise to this petition because in so far as the decision of this petition turns on any questions of fact, as I will later point out, that was a matter entirely within the jurisdiction of the Tribunal to decide and this Court will not interfere with any decision on a question of fact by the Tribunal.

3. The question of law that is argued on this petition and which is of so great an importance that contrary to the usual practice the Industrial Tribunal has thought fit to appear by counsel and argue it is, as to the right a director of a company who happens to be a legal practitioner to represent the company before the Tribunal. The Tribunal has held in this case that, although the right of a company to appear through a director was never in question, Mr. Hathi was appointed a director a couple of days before the hearing merely to circumvent the provisions

of Section 30(4) of the Industrial Disputes Act, 19-17, and the Tribunal therefore held that as he was a legal practitioner and therefore not entitled to represent the company, except with the consent of the other parties and the leave of the Tribunal, he could not appear in those proceedings.

4. Section 36 of the Industrial Disputes Act, 1947, deals with the representation of parties. Sub-section (1) deals with the representation of a workman and Sub-section (2) deals with that of an employer. Sub-section (3) provides that neither party shall be entitled to be represented by a legal practitioner in any conciliation proceedings under the Act or any proceedings before a Court of inquiry constituted under the Act. Sub-section (4) which is the section that has been canvassed on this petition is in these terms :

In any proceeding before a Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Tribunal.

Now, what is urged on behalf of the petitioners by Mr. Palkhivala is that this subsection relates to the employment of a legal practitioner merely for the purpose of appearing before the Tribunal in his professional capacity, and therefore this subsection has no bearing on the right of a corporation to be represented by an officer or director who happens to be a legal practitioner or on the right of an officer of a Trade Union who is entitled to appear under the provisions of Section 86(1) of the Act.

5. Now, it is in the first instance essential to appreciate the scope of Section 36 of this Act. Sub-sections (1), (2) and (4) of this Act are in substance the same as Section 33 of the Industrial Disputes (Appellate Tribunal) Act, 1950; and a full bench of the Labour Appellate Tribunal of India in the case of J. K. Hosiyery [1952] I L.L.J. 384 took the view that Sub-sections (1) and (2) of Section 33, which correspond to Sub-sections (1) and (2) of Section 86 of the Industrial Disputes Act, 1947, are intended to be exhaustive of the persons (other than the party himself) who may represent a workman or an employer in proceedings before the Appellate Tribunal. With great respect to the Tribunal, they appear to have overlooked that there are cases of representation other than the right of a party to appear himself, which are not included in this section. They also appear to have not attached sufficient importance to the operative words of these two sub-sections which are that a workman or an employer as the case may be "shall be entitled to be represented". These words to my mind clearly indicate that this section confers" a right upon the party, whether he be a workman or an employer, to be represented in the, manner set out in these sub-sections, and but for the provisions contained in those two sub-sections it would not have been open for a workman or an employer to be represented in the manner therein provided. Merely as a matter of construction, having regard to the operative words of the two sub-sections, I would be inclined to hold that Section 36 is an enabling section and not a restrictive section and it is not exhaustive of the right of representation of parties. But that is not the only reason for coming to that

conclusion. The full bench of the Labour Appellate Tribunal concedes in its judgment that a party to a dispute is entitled to appear himself. They appear to have overlooked the case of a corporation being a party who is incapable of appearing in person because it has no visible personality. What happens to the representation of a corporation if the provisions of Section 36 of the Industrial Disputes Act, 1947, are exhaustive of the right of representation? The right to be heard before the Tribunal is an important right of either party, and a corporation cannot be deprived of that right merely because it is incapable of appearing in person.

6. The Industrial Tribunal against whom the present petition is presented concedes the right of a corporation to be represented by a director or an officer. We will presently see how that right arises, but it is implicit in that concession that the right of representation of parties is not exhaustively dealt with in Section 36 and there are cases outside that section in which the parties would be entitled to be represented in a manner other than the manner set out in Section 36(1) and (2).

7. Turning next to the question as to how a corporation can be represented before a Tribunal, it was well settled at common law that a corporation must appear by an attorney as it was incapable of appearing in person. When they had to appear in Courts of law, they had to appear by such attorneys, by which I do not mean solicitors but agents authorised by the corporation to act for them, as were recognised by the Courts. In *Tritonia, Ltd. v. Equity and Law Life Assurance Society* [1943] A. C. 584 Viscount Simon L. C. points out (p. 586):

...In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally, the right of audience is necessarily limited to counsel instructed on the corporation's behalf.

The reason for counsel having to be briefed is explained by the learned Lord Chancellor in a later passage (p. 587) :

...Such a rule, limiting a right of audience on behalf of others to members of the English or Scottish or Northern Irish Bars, secures that the House will be served by barristers or advocates who observe the rules of their profession, who are subject to a disciplinary code, and who are familiar with the methods and scope of advocacy which are followed in presenting arguments to this House.

This case, therefore, although it lays down that a corporation can appear before the House of Lords only through counsel, merely emphasises the fact that a corporation cannot attend and argue personally and must, therefore, of necessity appear through some other agency. It appears that the practice in the County Courts in England is to allow a corporation to employ an agent who may not be a solicitor to act for the corporation. This practice is however based on an enabling provision to be found in Section 72 of the County Courts Act, 1888, which provides that the Judge may allow any person to appear and address the Court. Beyond therefore the position that a corporation cannot appear by itself, there is

no provision as to how it shall be represented. Normally, it could have been represented by a legal practitioner, but Section 36(4) of the Industrial Disputes Act, 1947, in terms prevents its being represented by a legal practitioner except with the consent of the other parties and with the leave of the Tribunal,

8. What then is to happen to the right of the corporation to be heard by the Tribunal ? The right to be heard is a substantive right, and a denial of that right would be a denial of justice. The manner, however, in which the corporation should be heard not having been provided for by Section 86 becomes a matter of procedure to be determined by the Tribunal whose duty it is to enable the corporation to appear before it. A Division Bench of this Court in *Mulchand Gulabchand v. Mukund* (1951) 54 Bom. L.R. 285 has in terms held that the manner in which a party should be represented is a matter of procedure to be determined by the Tribunal. Chagla C. J. in his judgment at p. 287 observes:

...Now, it is for the Courts or for tribunals to determine as a matter of procedure as to how parties should be represented and how they should present their case to the Court or the tribunal....

9. Therefore, it was open to the Industrial Tribunal to determine by way of procedure how a corporation should appear before it, and in the exercise of that power it has been the practice of the Industrial Tribunal to allow a corporation to be represented by a director or an officer, that being one mode in which a corporation can be represented. But if the Tribunal has the power to regulate its own procedure and to determine who shall represent a corporation for whose representation no provision has been made in the statute, is it or is it not open to the Tribunal to say that in allowing a corporation to be represented it shall not allow a party to appear if the effect of allowing him to appear would be to defeat the provisions of the Industrial Disputes Act, 1947, contained in Section 86(4) which prevents a legal practitioner from appearing without the consent of the other party and the leave of the Court ?

10. Now, in so far as Section 86(4) is concerned, two extreme views of this section are possible. One is that although a person may be a legal practitioner, if he is otherwise qualified to represent a party, the fact that he is a legal practitioner is not a bar to his appearing for the party in the proceedings. The other view is that although a party may be entitled to be represented by any person either named in Sections 36(1) and (2) or as a matter of procedure as laid down by the Tribunal in the case of a corporation by a director or an officer, such person cannot appear before the Tribunal if he happens to be a legal practitioner. Neither of these two views appears to be wholly right. Now, in the first instance, one may take the case of an employer who is himself a legal practitioner. As a party to a dispute he would undoubtedly be entitled to appear in person if he chooses to do so; and it appears to me that it would be difficult to hold that he cannot so appear merely because he happens to be a legal practitioner. This illustration helps to point out that the extreme view that a person who represents a party must in no event be a legal practitioner cannot

really be tenable. Therefore, it appears to me that if an officer of any Trade Union who is referred to in Sub-section 86(2) as qualified to represent a workman or an officer of an association of employers who is qualified to represent an employer under Sub-section (2) or an officer or director of a corporation through whom a corporation is entitled to be represented by the procedure governing the Tribunal happens to be a legal practitioner, that fact by itself cannot disqualify him from appearing before the Tribunal. But this pre-supposes that such an officer is a regular officer either of the Trade Union or the Association or in the case of an officer of a corporation a regular officer of the corporation, and in the case of a director that he is a bona fide director not elected a director merely for the purpose of enabling him to appear in a pending proceeding before a Tribunal. In other words, if a legal practitioner is transformed into an officer of a registered Trade Union or of an association of employers or of a corporation or is appointed a director of a corporation, in order to get over the disability imposed on a legal practitioner representing a party, then such a person shall not be allowed to appear and represent a party. But short of an intention to circumvent the provisions of Section 36(4), if a legal practitioner is ordinarily a regular officer either of a trade union or an association of employers referred to in Section 36(2) and (2) or of a corporation or if he is a director bona fide appointed as a director, I see nothing in Sub-section (4) to prevent his appearing on behalf of the party merely by reason of the fact that he happens to be a legal practitioner.

11. Now, in the case before me the Industrial Tribunal has in terms held that in this case there was an attempt to circumvent the provisions of Section 36(4) of the Industrial Disputes Act, and the Industrial Tribunal points out that Mr. Hathi acquired the qualifying shares only about 10 days earlier specifically for the purposes of becoming its director and he was appointed a director on September 15, 1953, the resolution of the board of directors was communicated to him on September 16, 1958, and he attempted to appear on September 17, 1958. The Tribunal also points out that this was probably done because the Alembic Chemical Works knew that there was likely to be an objection to Mr. Hathi appearing as a legal practitioner from the labour union.

12. Now, as I have said before, I am not concerned with the facts on which the Tribunal came to the conclusion that there was an attempt to circumvent the provisions of Section 36(4). As I have held that if there is an attempt to circumvent the provisions of Section 86(4) a legal practitioner making such an attempt should not be allowed to appear, it is for the Tribunal to decide in a given case whether there is such an attempt or not. That is a question of fact with which this Court will not concern itself, and in this case the Tribunal has so held and therefore it is not for this Court to say whether the Tribunal has come to a correct conclusion or not in that regard.

13. I may also deal with a suggestion that was made by Mr. Palkhivala in the course of his arguments that a corporation is not capable of having an intention or desire and therefore it cannot be said of a corporation that it intended to

circumvent the provisions of any law. In support of this contention Mr. Palkhivala relied upon a stray sentence from the observations of Lord Sumner in *Inland Revenue Commissioners v. Fisher's Executors* [1926] A.C. 395. That was a case dealing with an assessment to super tax. A limited company with large undistributed profits, instead of distributing those profits by way of a dividend, resolved to capitalise part of those profits and to distribute them pro rata amongst its ordinary shareholders as a bonus in the form of debenture stock, and the question for determination was whether the debenture stock were assessable to super-tax in the hands of the recipients as income of the shareholders. In this connection Lord Sumner observed (p. 411):

The proposition, that the substance of a transaction must be looked to and not merely the form, is generally invoked against those who have carried it out. I think it is unusual, where the form of a transaction is against those, whose transaction it is, to invoke the substance in their favour, in order to eke out what they have left defective in form. Sometimes again it is the "intention" of the company that is said to be dominant: *Burrell's case* (*Inland Revenue Commissioner v. Burrell* [1924] 2 K. B. 52; sometimes it is what the company "desired" to do (*Inland Revenue Commissioners v. Blott*; *Inland Revenue Commissioners v. Greenwood* [1921] 2 A. C. 171. In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers, The only intention, that the company has, is such as is expressed in or necessarily follows from its proceedings.

Mr. Palkhivala has fixed upon the sentence "In any case desires and intentions are things of which a company is incapable", as laying down a broad and general proposition that a corporation can have no intention. He ignores however that in the next but one sentence Lord Sumner points out that the only intention that the company has is such as is expressed in or necessarily follows from its proceedings, which clearly states that the company can have an intention but it is to be gathered from particular sources. The observations of the learned Law Lord must be read in the context in which they were made. In matters of taxation what is to be gathered is the true nature of a transaction and not the substance of it; and it is in that context that Lord Sumner said that it is not possible to talk of the intention or desire of a corporation, for you have to determine the true nature of the actual transaction which must be gathered from the proceedings or necessarily follows from them. I cannot possibly read these observations as laying down the proposition that a corporation can have no intention. There are several provisions in the general law of the land as well as the taxation statutes which deal with the consequences of a corporation having a particular intention, and if a corporation was incapable of having an intention all such provisions would be rendered nugatory. To take only one instance, Section 53 of the Transfer of Property Act provides that a transfer in fraud of creditors shall be voidable at the option of any creditor. I have never heard it suggested that if a corporation effected a transfer in fraud of creditors it was not liable to be set aside on the plea that a corporation could not have the intention to defraud.

It is unnecessary to point out to other similar provisions in the general law of the land; but dealing with the company law itself, it has been held that a company can be guilty of malicious libel or prosecution which must of necessity attribute malice to the company. I do not think therefore that it is possible to contend that a company is not capable of having an intention to circumvent the provisions of a statute, and when it in fact does so, it must be deemed to have been incapable of doing any such thing. .

14. My attention was drawn to a decision of the Labour Appellate Tribunal in *Morvi Electricity Works, Ltd.* [1953] II L.L.J. 664 in which a Division Bench of the Appellate Tribunal held that a practising advocate who is permitted to engage himself as a part-time labour officer will come under the disability of Section 36(4) of the Act and cannot represent the company in the proceeding if objected to by the workmen. This decision followed the Full Bench decision in *J. K. Hosiery*² to which I have earlier referred. In that case the question that was actually raised was whether a legal practitioner could appear for a corporation or for the matter of that a worker before the Tribunal by obtaining a power-of-attorney from the party concerned, and the Full Bench held that he could not. Now, it appears to me that where a legal practitioner who is debarred from appearing for and representing a party to an industrial dispute attempts to do so by resorting to the device of obtaining a power-of-attorney, he is obviously attempting to circumvent the provisions of Section 86(4) of the Industrial Disputes Act and the corresponding provision of Section 83 of the Industrial Disputes (Appellate Tribunal) Act, 1950, and on that basis, with respect, the judgment of the full bench was obviously right, but with respect to the Division Bench that decided the question in *Morvi Electricity Works, Ltd. and Its Workmen* I am unable to agree with that decision. In so far as a person is a regular officer of a union or an association of employers and as such entitled to appear or he is an officer of a corporation, he cannot by the mere accident of his being also a legal practitioner be prevented from appearing unless there are circumstances which enable the Tribunal to hold that on the facts of a particular case allowing him to appear would be to aid an attempt to circumvent the provisions of the Act.

15. I would only like to add that I share the opinion of the Industrial Tribunal that it is not in keeping with the dignity of the legal profession that a practising lawyer should be a party to any device whereby the provisions of a statute are sought to be defeated, and I do hope that no legal practitioner will allow himself to be made a party to any procedure whereby he is enabling the provisions of the Industrial Disputes Act to be circumvented.

16. In my opinion the petition must, therefore, fail and the petition is dismissed and the rule discharged with costs as against respondent No. 2. Respondent No. 1 to pay his own costs.